UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. M-11-144
STATE OF TEXAS, *et al*,	§	
Defendants.	§	

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

I. Factual and Procedural Background

Now before the Court is the Motion to Remand filed by Plaintiff Mexican American Legislative Caucus, Texas House of Representatives ("MALC"). (Doc. 5). MALC alleges that it is a non-profit organization established to serve members of the Texas House of Representatives and their staff in matters of interest to the Mexican American community of Texas, "in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting." (Doc. 1, Ex. 1-1 at ¶ 8). MALC's suit against Defendants State of Texas, Rick Perry in his official capacity as Governor of the State of Texas, David Dewhurst in his official capacity as Lieutenant Governor of the State of Texas, and Joe Straus in his official capacity as Speaker of the Texas House of Representatives, originally filed in state court in Hidalgo County and removed to this Court, is one of a number of cases pending in Texas state and federal courts challenging some aspect of the State's reapportionment of its electoral districts in the wake of the 2010 decennial U.S. census. (Doc. 1; Doc. 1, Ex. 1-1; *see* Docs. 7, 11). MALC's Original Petition, filed on April 5, 2011 before formal enactment of any redistricting plan, announces a two-fold purpose for its action: (1) to challenge the State's use of 2010 census data in its

redistricting efforts because that data severely undercounts Latinos in violation of Article I, § 3a (Equal Rights Amendment) and Article VI, § 2(c) (right of suffrage) of the Texas Constitution, and places an unreasonable burden on these voters in violation of the State's anti-discrimination statute, TEX. CIV. PRAC. & REM. CODE § 106.001(a)(6); and (2) to challenge then-current and proposed election districts for the Texas House of Representatives, Texas Senate, Texas State Board of Education, and U.S. House of Representatives because those districts contain substantial population disparities in violation of Article I, § 3 (Equal Protection Clause) and Article VI, § 2(c) (right of suffrage) of the Texas Constitution. (Doc. 1, Ex. 1-1 at Introduction, ¶¶ 31-40). Defendants removed the case on May 13, 2011, a few days after MALC filed a second lawsuit in the U.S. District Court, Western District of Texas, San Antonio Division, against the same Defendants and asserting essentially the same claims, but under the federal Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Doc. 1); *see* (Doc. 11 at pp. 5-6); 5:11cv361 at (Doc. 1).[1] This action was soon consolidated with other redistricting cases pending in the Western District and has been actively proceeding before a three-judge panel in that District. *See* 5:11cv361 at (Doc. 27); 5:11cv360. Therefore, although MALC requested remand of its action filed in this Court, the Court has refrained from ruling on the motion pending resolution of the consolidated action. (Doc. 5). At a status conference on September 14, 2012, MALC advised the Court of its position that the Court lacks jurisdiction to dismiss even those portions of the case that may be moot, and that only a decision from the Western District that the now-enacted redistricting plans are constitutionally *invalid* would completely moot MALC's lawsuit in this Court; in other words,

[1] As filed and amended, this lawsuit also differed from the present one in that it focused on the State's redistricting of the Texas and U.S. House districts, and also challenged the "state-wide, at-large, by place election system adopted and maintained by Defendants to elect Commissioners to the Texas Railroad Commission." 5:11cv361 at (Docs. 1, 4).

plans found to comply with the federal Constitution could still be contested on state constitutional grounds. As MALC continues to urge that this removed case presents only state-law claims and should be remanded, the Court now considers MALC's Motion to Remand and finds that it should be denied for the following reasons.

II. Analysis

A. Parties' Arguments

Although MALC's Original Petition on which this case was removed alleges only state constitutional and statutory violations and seeks relief only under state law, Defendants assert that it presents a federal question justifying removal because the "one person, one vote" rule prohibiting excessive population deviation among U.S. congressional districts arises under Article I, § 2 of the U.S. Constitution. (Docs. 1, 6). Defendants also argue that even if MALC's claims do not arise directly under federal law, removal was proper because those claims necessarily depend on the resolution of substantial, disputed questions of federal law, *i.e.*, they require the application of Article I, § 2 and an evidentiary showing that U.S. census numbers are in fact inaccurate. *Id.* Finally, Defendants contend that federal law preempts MALC's "one person, one vote" claim as it relates to U.S. congressional districts because the obligation to create those districts arises from a federal statute, 2 U.S.C. § 2c, and the State's obligation to ensure that districts are equally populated is founded in Article I, § 2. *Id.*

MALC moves to remand on the principal bases that federal courts must defer to the State and its judiciary in redistricting disputes, that state courts are competent fora for challenging U.S. congressional redistricting, and that MALC has pleaded no federal question on the face of its petition. (Docs. 5, 8).

B. Deferral to State Judiciary

The Court first turns MALC's argument that remand is warranted because federal Supreme Court jurisprudence requires federal courts to defer consideration of redistricting claims to the state judiciary. (Docs. 5, 8). MALC relies on the U.S. Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), in which the Court observed that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting, where the State, through its legislative *or* judicial branch, has begun to address that highly political task." *Emison*, 507 U.S. at 33 (emphasis in original). The problem with MALC's reliance on *Emison* is that the rule of deferral is not a jurisdictional one; in fact, it operates only where federal and state courts exercise concurrent jurisdiction over challenges to the same redistricting scheme. *See Emison*, 507 U.S. at 32. Further, *Emison* and the authority on which it relies instruct that a federal court may intervene where a State body, including its judiciary, cannot timely do so. *Emison*, 507 U.S. at 36-37; *Scott v. Germano*, 381 U.S. 407, 409-10 (1965). The question before this Court, therefore, is not whether the obligation to "stay its hand"[2] requires remand, but whether the absence of a federal question in MALC's Original Petition warrants this remedy.

C. Whether MALC's Claims Present a Federal Question

The Court next considers the parties' arguments regarding whether MALC's Original Petition relying exclusively on state law nonetheless raises a federal question, or asserts claims completely preempted by federal law. A defendant may remove to federal district court any state-court action "arising under the Constitution [or] laws…of the United States." 28 U.S.C. § 1331; *see also* §§ 1441, 1446. Whether a claim arises under federal law is governed by the "well-pleaded complaint" rule. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

[2] *See Germano*, 381 U.S. at 409.

Under this rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* "A federal question exists 'only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Singh v. Duane Morris LLP*, 538 F.3d 334, 337-38 (5th Cir. 2008) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)) (emphasis added). The latter test is met where "'a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" *Id.* at 338 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). The Fifth Circuit has interpreted this test to require all of the following: "(1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Id.* Finally, under an "independent corollary" to the well-pleaded complaint rule known as the "artful pleading" doctrine, a plaintiff may not avoid removal by "artfully" failing to plead a necessary federal question. *See Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008) (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)). Thus, "'the artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.'" *Id.* (quoting same).

Defendants submit that by challenging the State's U.S. congressional districts as deviating in population to an impermissible degree, thus diluting the vote of members of "overpopulated" districts, MALC has pleaded a claim created or preempted by, or at least dependent upon, Article I, § 2 of the U.S. Constitution. (Docs. 1, 6). That section, as modified by § 2 of the Fourteenth Amendment, provides that members of the U.S. House of

Representatives are to be chosen "by the People of the several States" and apportioned "according to their respective numbers, counting the whole number of persons in each State…." U.S. CONST. art. I, § 2, cl. 1; amend. XIV, § 2. As Defendants point out, the U.S. Supreme Court has held that "the command of Art. I, [§] 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Therefore, it is clear that MALC could have invoked Article I, § 2 in asserting its "one person, one vote" claim. However, it is also well-established that the plaintiff is the master of its claim and may avoid federal jurisdiction by exclusively relying on state law, even where federal remedies might also exist. *Caterpillar*, 482 U.S. at 392; *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011); *see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995) ("A plaintiff with a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, but taking the risk that [its] federal claims will one day be precluded."). The Supreme Court suggested subsequent to *Wesberry* that the "one person, one vote" principle as applied to congressional redistricting derives not only from Article I, § 2 but from the "fundamental" federal constitutional requirement of "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *See Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). In other words, population deviation among congressional districts also implicates equal protection principles. Here, MALC has chosen to contest Texas's congressional redistricting plan under provisions of the Texas Constitution guaranteeing equal protection of the laws and the right of suffrage. Challenges to congressional redistricting are not so uniquely federal in character that that Texas courts are precluded from considering them, *see generally Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001), and case law cited

by MALC suggests that Texas's Equal Protection Clause also protects against excessive population deviation among state legislative districts. *See Burroughs v. Lyles*, 181 S.W.2d 570, 574 (1944) (Texas equal protection clause applies to political rights); *Avery v. Midland Cnty.*, 406 S.W.2d 422, 425, 428 (Tex. 1966) (affirming judgment of trial court that "patent malapportionment" of Midland County commissioners' court precincts, without rational basis, violated equal protection guarantees of Texas Constitution).[3] MALC's claim that population deviation among U.S. congressional districts in Texas deprives persons of that State of the protections afforded by Article I, § 3 and Article VI, § 2(c) of the Texas Constitution presents only questions of state constitutional interpretation, regardless of the dictates of Article I, § 2 or the Fourteenth Amendment.[4] For all of these reasons, the Court finds that federal law does not create or preempt MALC's "one person, one vote" claim as pleaded. Further, MALC's claim does not depend upon consultation of Article I, § 2 to resolve whether Texas's congressional districts violate its Constitution. Accordingly, the Court rejects Defendants' argument that MALC's "one person, one vote" claim presents a federal question.

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[3] The Texas Supreme Court in *Avery* also reversed the portion of the trial court's judgment requiring redistricting *solely* on the basis of population, finding that the equal protection clauses of the Texas and U.S. Constitutions did not contain such a requirement. *Avery*, 406 S.W.2d at 428-29. Upon review, the U.S. Supreme Court disagreed that substantially unequal population among the precincts did not necessarily violate the Fourteenth Amendment and held that the federal equal protection clause "permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." *Avery v. Midland Cnty.*, 390 U.S. 474, 484-85 (1968). The Court did not consider whether the Texas equal protection clause offers similar protection, but this does not somehow mean that MALC's claim brought pursuant to that clause arises under the federal Constitution. The Court's decision left undisturbed the Texas Supreme Court's invalidation of the county's redistricting scheme on state constitutional grounds, which can now properly serve as the basis for MALC's redistricting challenge.

[4] The Court recognizes that MALC's "one person, one vote" claim may invite comparison of Texas's equal protection guarantees with those arising from Article I, § 2 and the Fourteenth Amendment, but consultation of analogous federal constitutional principles does not in itself convert a state-law claim into one that is created or preempted by, or that necessarily depends upon, federal law. Also for this reason, the Court rejects Defendants' argument that MALC's citation to cases applying federal law reveals the presence of a federal question. *See* (Docs. 1, 6).

Still, the Court is persuaded by Defendants' alternate argument that MALC's state-law challenge to the use of "inaccurate" U.S. census data to formulate the State's redistricting plans necessarily requires the resolution of substantial and disputed issues of federal law. (Docs. 1, 6). This challenge specifically implicates the conduct of federal actors, and its resolution depends upon a showing that federal census procedures in fact resulted in an undervaluation of the Latino population in certain regions of Texas. *See* (Doc. 1-1 at ¶¶ 9-23) (alleging, among other things, that manner in which Census Bureau conducted census in Hidalgo County and other border area counties resulted in undercount). Also, whether an undercount occurred is actually disputed by the parties and concerns the substantial federal interest in conducting a decennial census. *See* U.S. CONST. art. I, § 2, cl. 3 (directing Congress to conduct an "actual Enumeration" every ten years after initial census); 13 U.S.C. § 141. Finally, although legislative redistricting is primarily a matter left to the state legislature and timely action by the state judiciary, this rule of deferral does not extend to contests to the inherently federal procedures used to arrive at the data on which redistricting is based. Notably, MALC has provided no argument for why its challenge to the use of the 2010 U.S. census data does not present a federal question. *See* (Docs. 5, 8). The Court finds that it does and that removal was proper on this basis.

IV. Conclusion

For the foregoing reasons, the Court hereby **ORDERS** that MALC's Motion to Remand (Doc. 5) is **DENIED**.

SO ORDERED this 28th day of September, 2012, at McAllen, Texas.

Randy Crane
United States District Judge